UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE,

and **Case 14–CA–195011**

ROY YOUNG, an Individual,

Rotimi Solanke, Esq.,
for the General Counsel.
Roderick Eves, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in St. Louis, Missouri, on September 25 and 26, 2017. Roy Young, an individual, filed a charge on March 17, 2017, and a first amended charge on June 30, 2017. The General Counsel issued the complaint on June 30, 2017.[1] The complaint alleges that the United States Postal Service (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) by directing employees to restrict email message responses to managers and directing employees to refrain from copying other employees when using Respondent's email system. (GC Exh. 1(c).) The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by issuing Young a notice of suspension because he engaged in protected, concerted activities and to discourage employees from engaging in such activities. Respondent timely answered the complaint, denying that it violated the Act.[2] (GC Exh. 1(f).)

[1] All dates are in 2017, unless otherwise indicated.

[2] During the hearing, the General Counsel moved to amend par. 9(a) of the complaint to indicate that on about November 30, 2016, the union via the filing and service of its representation petition in Case 13–RC–188930, requested that Respondent recognize it as exclusive collective-bargaining representative of the unit and bargain collectively with the union as exclusive collective-bargaining representative of the unit. There was no objection to the proposed amendment and I granted the General Counsel's motion. (Tr. 399–402.)

At the close of the hearing, the General Counsel moved to amend the complaint to conform to the evidence adduced at trial. Specifically, the General Counsel moved to add a violation of Section 8(a)(1) of the Act based upon a statement to an employee on March 14 that the employee was to keep confidential his work instructions. (Tr. 399–400.) Respondent's counsel asked that I reserve ruling on the motion until after reviewing the parties' briefs. (Tr. 401.) I granted the General Counsel's motion, finding that the allegation was fully litigated and sufficiently related to the allegations already contained in the complaint.[3]

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,[4] including my own observation of the demeanor of the witnesses, [5] and after carefully considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States and operates various postal facilities throughout the United States in the performance of that function, including a Maintenance Technical Support Center (MTSC) workgroup located in Norman, Oklahoma, which provides postal equipment support services with employees located at various postal facilities. The National Labor Relations Board (Board) has jurisdiction over Respondent by virtue of Section 1209 of the Postal Reorganization Act (39 U.S.C. § 101 et seq.). Respondent admits, and I find, that the American Postal Workers Union, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Facilities and Supervisory Structure

Respondent operates a Maintenance Technical Support Center (MTSC) in Norman, Oklahoma. (Tr. 188.) The MTSC is a single, virtual installation; the first of its kind in the Postal Service. (Tr. 286.) The MTSC operates 24 hours a day, 7 days a week. (Tr. 34.) It supports over 280 postal facilities with their maintenance programs and provides phone support, project

[3] Sec. 102.17 of the Board's Rules and Regulations leaves the administrative law judge discretion in granting motions to amend filed during the hearing; however, where the matter has been fully litigated at the hearing and the amendment conforms the complaint to the evidence adduced, the judge's denial of such a motion would be in error. *Anglo Kemlite Laboratories, Inc.,* 360 NLRB 319, 323 (2014), citing *The Lion Knitting Mills Co.,* 160 NLRB 801, 802 (1966).

[4] The transcript in this case (Tr.) is mostly accurate, but I correct it as follows: Tr. 178, l. 17, "884" should be "8(a)(4)"; Tr. 279 l. 6, "bridge" should be "abridge"; and Tr. 301, l. 20, "61(c) should be "611(c)."

[5] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

support, and onsite support. (Tr. 321.) The MTSC also has a Help Desk, staffed around the clock, which takes calls from the field and routes technicians to assist. (Tr. 321.)

Dan Fauchier is a maintenance engineering analyst at the MTSC in Norman, Oklahoma. (Tr. 288.) Fauchier oversees Respondent's national support technicians (NSTs) in scheduling and assignments of duties. (Tr. 289.)

Erich Henegar has been employed by Respondent as a maintenance management specialist since December 24. (Tr. 191.) He manages the NSTs, including the Charging Party, and the Help Desk employees that support them. (Tr. 191, 193.) Henegar was a craft employee for 12 or 13 years before moving into management. (Tr. 192.) He also served as a union official. (Tr. 192.) Henegar is Fauchier's manager.

Brian Watts is a maintenance field support specialist at the MTSC in Norman, Oklahoma. He manages the Technical Publications Group, the schedulers for the NSTs, and the managers of the NSTs. (Tr. 321.) Watts is Henegar's manager.

Respondent admits, and I find, that Henegar, Watts, and Fauchier are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(f).)

B. Respondent's National Support Technicians

Respondent employs about 100 national support technicians (NSTs) assigned to the MTSC. NSTs are scattered throughout the United States in about 76 locations and in 6 different time zones. (Tr. 194–195, 324–325.) NSTs take rest and lunch breaks at different times (this is left to their discretion). (Tr. 195–196.) Managers and other NSTs are generally not aware of when an NST is working or on a break. (Tr. 150, 196, 198.) NSTs sometimes have to travel to different facilities to assist in servicing equipment. (Tr. 33.)

NSTs have offices, desks, chairs, computers, smartphones, and access to the Internet at their domiciled facilities. (Tr. 235–236, 325.) NSTs receive service calls routed through a virtual workspace called ServiceNow or via email from the Help Desk. (Tr. 325.) When an NST receives a work assignment, sometimes called a log or ticket, he or she calls the postal facility experiencing technical difficulties and works with maintenance employees at the affected site to diagnose and resolve the problem. (Tr. 325–326.) ServiceNow creates a log for the service call, which is viewable by any technician or manager. (R. Exh. 3; Tr. 86–87.) This log contains details regarding the type of equipment, the nature of the problem, and comments regarding steps taken to resolve the problem. (R. Exh. 3.) There is no set amount of time that an NST should spend on a call. (Tr. 249.)

NSTs communicate with each other and with their managers via email, text messages, or via telephone. (Tr. 327.) However, email is the primary mode of communication between NSTs and their managers. (Tr. 198.) Emails sent to "MTSC-DL-National Support Technicians" (MTSC distribution list) are received by all MTSC employees, including all NSTs, supervisors, and managers. (Tr. 56, 208.)

The MTSC also employs subject matter experts (SMEs), who have in-depth and specialized training. (Tr. 31.) NSTs have a broad base of knowledge across several platforms. (Tr. 329.) SMEs are specialized to one or two pieces of equipment. (Tr. 329.) An NST can escalate a problem to an SME, without supervisory approval, if he or she cannot resolve the problem. (Tr. 31, 249.) About one-third of the calls received by NSTs need to be escalated to an SME. (Tr. 248.)

C. Respondent's Labor and Employee Relations

Some of Respondent's employees are represented for purposes of collective bargaining by the American Postal Workers Union, AFL–CIO (Union). Respondent and the Union are signatory to a collective-bargaining agreement, the version relevant here is effective from 2015 to 2018. (GC Exh. 2; Tr. 36.)

In 2016, all of the NSTs were brought under a single management structure for administrative and collective-bargaining issues, as well as work assignments. (Tr. 189.) Previously, NSTs reported to the facility manager where they are domiciled. (Tr. 189.)

D. Employment of Roy Young

Charging Party Roy Young (Young) has been an employee of Respondent for over 34 years. (Tr. 22.) Young is an NST and a member of a bargaining unit of employees represented by the Union. (Tr. 22–23, 36.) He is the only NST domiciled at the main Post Office in St. Louis, Missouri. (Tr. 23–24.)

Young has been a union member throughout his employment with Respondent. (Tr. 38.) He has previously served as a shop steward and maintenance craft director for the Union. (Tr. 37.) Young has also filed grievances regarding denial of overtime, denial to work holidays, and denial of training. (GC Exh. 8; Tr. 43–44.)

Young has filed charges with the Board against Respondent. (GC Exhs. 23(a) and 23(b).) Young has filed Board charges related to the Union's alleged failure to assist him. (Tr. 50.) He has also filed charges with the EEOC and through Respondent's internal EEO process. (Tr. 47.)

Young has served on several local negotiating committees. (Tr. 38.) In this capacity, Young participated in negotiations for local agreements as recently as November 2016. (Tr. 39.) Many of Young's supervisors have participated in negotiations on behalf of Respondent. (Tr. 39–40.)

E. Email Exchange Regarding Young's Leave Request, including Emails of January 9 and 10

On December 29, 2016, Young initiated an email exchange informing an administrator at the MTSC and individuals at his domiciled site that he would be on annual leave effective December 30, 2016. (GC Exh. 10; Tr. 73, 75.) Young also submitted a leave form (Form 3971) to Fauchier on December 29, 2016, requesting annual leave. (GC Exh. 31; Tr. 73–74.) Young listed the reason for his leave request as "family emergency." (GC Exh. 31.) Fauchier advised the MTSC administrator to place Young on leave without pay (LWOP), despite his having over

400 hours of accrued annual leave. (GC Exh. 10; Tr. 76, 78.) Fauchier advised Young that he would be placed on LWOP until "documentation" was provided.[6] (GC Exh. 10.) Fauchier did not advise Young what kind of documentation was required to support his leave request. (Tr. 304.)

On December 29, 2016, Young sent an email to Fauchier and the MTSC distribution list stating, "For your reference this annual is scheduled in advance and approve[d] therefore is not emergency request. Your request for documentation is inconsistent with Postal Policy." (GC Exh. 10, p. 4.)

On January 9, Henegar sent an email reminding Young that Fauchier had previously requested documentation in support of his leave request. (GC Exh. 10, p. 3; Tr. 78.) Henegar explained that Young's leave request was considered a request for emergency leave because it was made after the posting of the schedule. (GC Exh. 10, p. 1–2.) Henegar further advised Young, "Any response to this email should be restricted to Dan and me." (GC Exh. 10, p. 3.) That same day, Henegar charged Young with being absent without leave (AWOL). (GC Exh. 10; Tr. 79.)

Young copied his January 10 response to Henegar to the MTSC distribution list and several union officials. (GC Exh. 10, p. 2–3.) Young believed that his participation on a local collective-bargaining team was causing Respondent to harass him. (GC Exh. 10, p. 2.)

Henegar responded to Young's email on January 10, assuring him that his participation in union negotiations had nothing to do with this issue. (GC Exh. 10, p.1; Tr. 82–83.) Henegar also advised Young to limit his response, as follows

> First, I have asked you to restrict your email to Dan and me. Specifically, you are afforded grievance rights under Article 15 of the National Agreement should you disagree with the directive. You are not empowered with the right to the equivalent of screaming on the work room floor. Please ensure that you are using the appropriate channels.

(GC Exh. 10, p. 1; Tr. 79.)

Young responded to Henegar, copying the MTSC distribution list and several union officials, on January 10

> I have no private or confidential information concerning my employment with the U.S. Postal Service, when wages, benefits or working conditions are topic[s] of discussion.

[6] In Fauchier's opinion, Young was requesting emergency leave, which requires supporting documentation. (Tr. 303.) Fauchier testified that schedules are posted on Wednesdays and that leave requested prior to Wednesday is considered "scheduled leave." (Tr. 304.) According to Fauchier, if an individual requests leave after Wednesday of a particular week, it is not considered scheduled leave. (Tr. 304.) However, Henegar testified that Young's request was denied because Respondent was not granting leave in December. (Tr. 261.)

> Further when it is determined that I'm dealing with persons ok with lying I prefer that all conversations be public so there is no misunderstanding.
>
> If you have something you don't want public don't send it to me.

(GC Exh. 10, p. 1.)

Young copied the other NSTs because he wanted to alert them that, in his opinion, Respondent was trying to change the ways in which employees take leave. (Tr. 80.) He also wanted the Union to be aware that Respondent was denying him leave or requiring him to submit documentation for his leave, which Young did not believe was allowable under the contract. (Tr. 80–81.) Young further believed that Henegar and Fauchier were going to retaliate against him with discipline.[7] (Tr. 81.)

F. Email Exchange Regarding Training Opportunity

On January 25, Young and the other NSTs received an email from Fauchier seeking applicants for an upcoming training on a piece of equipment (TMS).[8] (GC Exh. 6, p. 3; Tr. 59, 183.) Fauchier's email indicated that priority would be given to applicants who had this equipment within 50 miles of their domiciled site. (GC Exhs. 6, 7; Tr. 153, 183.) The referenced equipment was not located within 50 miles of St. Louis. (Id.) Young volunteered for this training on January 26. (GC Exh. 6, p. 3.) Young's response copied numerous union officials. Young believed he should have received the training because he frequently works on equipment that is not near his domiciled site. (Tr. 183.)

Young sent another email to Fauchier, copying several union officials on February 23. (GC Exh. 6, p. 3.) Young asked for the names of the technicians selected for the training. (Id.) After receiving no response, Young emailed several union officials about the training opportunity. Young believed that the MTSC discriminated against certain employees by denying them training, which then caused the employees to be ineligible for assignments due to a lack of training. (GC Exh. 6, p. 2.)

Clearly frustrated, Young sent an email to the entire MTSC distribution list stating, "I still haven't heard who volunteered, who was selected, system not transparent to all." (GC Exh. 6, p. 1.) Young believed junior employees were given the training. Young's emails were all sent during work time. (Tr. 68.) Another NST, Joseph Jeske, responded to Young that he had not heard either and that he [Jeske] believed this was an "ongoing problem." (GC Exh. 6.)

NST Mike Tretick also responded to Young's email. (GC Exh. 7, p. 3.) Tretick did not believe that seniority should dictate who receives training. (Id.) Another NST agreed with Tretick, but also stated that he "wish[ed] others would make their opinions known on this matter,

[7] In its brief, Respondent conceded that Young was engaged in protected, concerted activity in copying his emails of January 10 to the MTSC distribution list and union officials. (R. Br. 2.)

[8] Nothing in this exchange of emails is alleged as an unfair labor practice. However, the General Counsel maintains that this exchange highlights that Young was engaged in protected, concerted activity via email. (GC Br. p. 23.)

because it is intrinsic to the job we do." (GC Exh. 7, p. 2.) NST Maynard Yoder joined in Tretick's opinion. (Id.) Jeske responded to the group, indicating that seniority and common sense should dictate training assignments. (Id.) NST Rick Clary joined the discussion in support of Young, noting that Young was, "defending the current contract" and his view was "shared by many." (GC Exh. 7, p. 1.)

G. Email Exchange of February 8 Regarding Service Log (South Jersey)

On February 8, Young received a work assignment for a piece of equipment at a New Jersey facility (South Jersey site or facility). (GC Exh. 21.) During the course of his conversation with the supervisor at the South Jersey site, Young realized that there was an NST at the site. (Tr. 88.) Young advised the supervisor to consult with the NST who was there. (Tr. 88.) Young estimated that he spent 30 minutes on the call assisting the supervisor at the site before advising him to consult with the NST who was there. (Tr. 89.)

On that same date, Henegar viewed a ServiceNow log regarding this maintenance issue.[9] (GC Exh. 21.) Henegar then sent an email to Young questioning his approach to the call.[10] (GC Exh. 21; Tr. 85-87.) Henegar was not aware that there was an NST at the South Jersey facility, as his email asked, "Were you requesting another NST to come and diagnose this issue?" (GC Exh. 21.)

Henegar asked Young why he advised the facility to request onsite assistance after only 25 minutes. (GC Exh. 21.) Henegar testified that he asked Young about this because the log did not contain any information about what steps Young took prior to seeking the assistance of an NST on site. (Tr. 201.) Henegar also found that Young's advice to elevate the ticket to an NST on site after less than 30 minutes was unusual. (Tr. 203.)

Young replied to Henegar, stating

> If you would examine this log, you would see it was opened yesterday. I made suggestion yesterday configuration, adjustments, examine for scale binding etc. Site has exhausted all suggest[ions and] ask[ed] what [] be next[.] They informed me they had a NST at their site which [may be] trained[.] I suggested he look at system. Rather than delay the mail or lose revenue due to scale problems I told them onsite was an option. Is there a problem[?]

(GC Exh. 21, p. 2; Tr. 92–93.)

Young's reply to Henegar copied the MTSC distribution list and several union officials. (GC Exh. 21.) Young testified that he did so because he was fearful of discipline and because he

[9] Watts did not remember if he spoke to Henegar about Young and the February 8 incident. (Tr. 382.) However, Watts and Henegar were added to watch list for Young's log, meaning they would have received an email anytime the log was updated. (R. Exh. 8; Tr. 383.) It seems highly unlikely that Watts and Henegar did not speak about this incident.

[10] Young conceded that managers in the MTSC have the right to ask the NSTs questions about their work and that the NSTs need to answer those questions. (Tr. 151.)

feared that Henegar was trying to "dig at something in order to accuse [him] of something." (Tr. 94.)

Henegar replied to Young, stating

> Again, my individual questions to you do not need to be broadcast to the entire network. This was a technical question to understand the diagnostic logic. It was not directed at the other men and women in the network and it is not a prudent use of their time to be included on a question to you. Please refrain from this activity during your working hours that is not directly related to supporting a log.

(GC Exh. 21. p. 1–2.)

Young's February 8 email was work-related. (Tr. 273.) However, Henegar considers work instructions to a single employee private. (Tr. 275276.) Henegar believed that Young's response to the entire network was not an efficient use of everyone's time, as his concern was specific to one ticket handled by Young. (Tr. 204.) Furthermore, if Henegar needed to reprimand Young, he would not have wanted to do so in front of others. (Tr. 205.) Henegar testified that he was not trying to abridge Young's ability to confer with the Union or file a grievance. (Tr. 279.)

Young initially responded only to Henegar after Henegar requested that Young not broadcast his response to the entire network. (GC Exh. 21, p. 1; Tr. 208.) Later, Young sent the same response to Henegar, which he copied to the MTSC distribution list and certain union officials. (R. Exh. 2; Tr. 208.) Young's responses stated

> In light of the harassment intimidated [sic] and threats receive [sic] from MTSC I fell [sic] it is only prudent to have our conversations in a public forum. You are making for a very hostile work environment with these threats if this was a technical question as you stated it could only benefit the whole network as to proper procedures[.]

(R. Exh. 2.)

Young believed that Henegar was trying to harass him and hoped other employees would support him. (Tr. 96.) Despite the subject of the email being Young's diagnostic logic, Young could have been subject to discipline if he had handled the incident incorrectly. (Tr. 96.)

Henegar responded to Young indicating, "There is no harassment here. Just trying to understand how we are advising the field. Your explanation was satisfactory and appreciated." (GC Exh. 21, p. 1.)

Young received an email from Jeske on March 9. (GC Exh. 6; Tr. 97.) This email was not in direct response to the emails listed above. (GC Exh. 21; R. Exh. 3.) Jeske advised Young that he agreed with his diagnostic assessment and supported him in his procedure. (GC Exh. 6; Tr. 97–98.) Jeske further stated that Henegar was harassing Young and trying to discredit him. (GC Exh. 6, p. 1.)

H. Email Exchange of February 10 Regarding Service Log (Lincoln)

On February 10, Brian Watts initiated an email exchange regarding a flat sorter machine being serviced by Young. (GC Exh. 11; Tr. 99–100.) The email was copied to Henegar attached the ServiceNow log for the incident. The equipment was located in Lincoln, Nebraska. After trying to assist an employee at the site with the problem for about 35 minutes, Young decided to escalate the incident to a subject matter expert (SME). (Tr. 102–103.) Watts asked Young to clarify his thought process for escalating the incident to a SME, stating

> Roy please clarify your thought process for escalating this to [an] SME, [it is] very important that the NST's [sic] exhaust every avenue for resolution at their level? [sic]
>
> Maybe I am missing something but would like to understand your decision making on this, thanks.

(GC Exh. 11, p. 2.)

In his reply, Young copied the MTSC distribution list and some union officials. Young copied the others because he felt he was being harassed and because he was trying to create a record in the event he received discipline. (Tr. 105.) Young stated

> Am I the only one being harassed by these emails you and Mr. Henegar keep sending me? I'm sure if you had some technical experience you would understand these matter[s] but to educate you [sic]. When I make a professional assessment with my more than 40 years of training and experience in order to provide the site with the assistance needed I make the appropriate call in my opinion, [sic] If you have other thoughts on how better to serve the site please share.

(GC Exh. 11, p. 2.)

Watts felt Young's response was inappropriate, as it was both flippant and dismissive. (Tr. 335–336.) Watts also felt that copying the MTSC distribution list was inappropriate. (Tr. 336.)

Watts responded to Young, copying Henegar, stating

> Roy just trying to understand why after working with the site for 35 minutes you chose to escalate the problem to a SME with no way of knowing if the cable replacement fixed the problem.
>
> So you know Erich and I communicate with other NSTs on a variety of issues to accomplish MTSC's goal of supporting the field in an efficient manner. No need to write me back on this topic as you have been previously instructed on several occasions, when corresponding with management it's not necessary to copy the

> entire network. Thanks and please focus your efforts on resolving tickets in an efficient manner to support the network.

(GC Exh. 11, p. 1.)

Young responded, again copying the MTSC distribution list and some union officials, as follows

> As stated before if we are discussing postal issues I had no secrets and you know I feel MTSC has not been very truthful on numerous occasions so I prefer all conversations be in [an] open forum. To assist you in understanding my duties I would refer you to [Management Instruction AS-530-1999-5 regarding the responsibilities of NSTs].

(GC Exh. 11, p. 1.)

Watts described Young's emails to other NSTs as, "divisive." (Tr. 356–357.) Watts believed his email conversation with Young on February 10 should have remained private. (Tr. 359.)

I. Email Exchange Initiated March 7 Regarding REAL ID

On March 7, Fauchier sent an email to the MTSC distribution list regarding the posting of a position. (GC Exh. 12, p. 8.) Later that day, NST Jimmy Martin provided a link to the posting. Martin's email was sent to Fauchier and the MTSC distribution list. In response to this link, NST Gary Freeman sent an email to Martin, Fauchier, and the MTSC distribution list asking if anyone had heard about new identification requirements for air travel. (GC Exh. 7, p. 7.)

On March 8, NST Muncy Henderson sent an email to Freeman, Martin, Fauchier, and the MTSC distribution list. (GC Exh. 12, p. 4.) Henderson's email contained information from the Department of Homeland Security regarding states which were compliant with the REAL ID Act,[11] as well as lists of noncompliant states and states which had received an extension of time to comply. Henderson indicated that his state's extension was running out in a few months and that he would be applying for a passport.

Later on March 8, Freeman sent an email to several other employees, Fauchier, and the MTSC distribution list. (GC Exh. 12, p. 3.) Freeman asked what the MTSC was going to do to provide the NSTs with REAL ID compliant identification for use on official travel.

[11] "Passed by Congress in 2005, the REAL ID Act enacted the 9/11 Commission's recommendation that the Federal Government 'set standards for the issuance of sources of identification, such as driver's licenses.' The Act established minimum security standards for state-issued driver's licenses and identification cards and prohibits Federal agencies from accepting for official purposes licenses and identification cards from states that do not meet these standards." https://www.dhs.gov/real-id-public-faqs.

On March 9, Fauchier sent an email to the MTSC distribution list regarding the REAL ID issue. (GC Exh. 12, p. 2; Tr. 108.) Fauchier advised the NSTs that each individual would be responsible for having identification compliant with TSA requirements under the REAL ID Act. Fauchier further explained that individual employees would need to bear the cost of obtaining such identification. NST Geoffrey Stevens replied to Fauchier, copying the MTSC distribution list, disagreeing with Fauchier's position. Stevens believed that Respondent should bear the cost of employees' identification required for official travel. Two other NSTs also responded to the entire MTSC distribution list with opinions on the issue.[12] (GC Exh. 12, p. 1.)

On March 13, Fauchier sent a final email to the MTSC distribution list regarding the REAL ID issue. (GC Exh. 12, p. 1.) Fauchier believed that continued conversation would take away from employees' performance of their official duties. (Tr. 294.) The question had been answered and Fauchier felt the conversation needed to stop. (Tr. 295.) Fauchier advised employees, "The cost of required ID for travel is on the traveler due to the fact that the same ID can be used for personal use as well. END OF SUBJECT please! If you have additional concerns/comments on this subject, direct them to me ONLY." (Emphasis in original) (Id.)

J. March 14 Instruction of Henegar to Avoid Dissemination of Emails

On March 14, Shawn Collins, acting duty officer, sent an email to Young seeking support for a facility. (GC Exh. 13; Tr. 114.) Collins sent the work assignment via email at 12:03 p.m. and Young did not see it until 12:49 p.m. (Tr. 117.) Young asked Collins to call him in the future, instead of sending an email, when seeking assistance.[13] (GC Exh. 13; Tr. 116.) On March 15, Henegar advised Young to monitor his email, phone, and VOIP for incoming service logs. In his email, Henegar stated

> You and I have discussed my expectation that you work diligently in addressing HelpDesk logs in the past and I do not consider your email below to be in adherence to my instructions. Failure to monitor your emails for incoming work logs is a dereliction of duty and insubordination for failure to follow a direct order concerning your job duties. Therefore, you must monitor your email, phone and VOIP for incoming logs and work those or you will be subject to corrective action.
>
> I am responding to you by email and you may respond to me directly or call me, if you prefer. This is a reiteration of my work instructions performance expectations and is not appropriate for dissemination to the network or anyone else beside you and me. Please ensure that you are working logs and helping our customers, regardless of the format in which they are transmitted. This message is not intended to abridge any rights you have under the NLRA and your Article 15 rights afford you the opportunity to consult with the appropriate steward if you have any wish to file a grievance over the matter.

[12] Respondent conceded that the employees were engaged in protected, concerted activity in the course of the emails regarding the REAL ID issue. (R. Br., p. 2.)

[13] In the course of a workday, Young estimated that he received up to 120 emails. (Tr. 84.)

(GC Exh. 13.) Henegar marked this email as "Private." (GC Exh. 13.) Henegar testified that he marked this email private because he considers work instructions to a single employee are private. (Tr. 275–278.)

Young responded to Henegar, copying the MTSC distribution list and certain union officials.[14] (GC Exh. 13; Tr. 115.) Young said he did so to inform other NSTs of what he deemed a "change in policy." (Tr. 119.) Young advised Henegar to review the Standard Operating Procedure (SOP) for NSTs. (GC Exh. 13.) The SOP requires NSTs to check their email twice a day while on duty. (GC Exh. 3, p. 6.)

K. Evidence Regarding Use of Respondent's Email System

Respondent maintains Management Instruction EL-660-2009-10 (MI), entitled Limited Personal Use of Government Office Equipment and Information Technology. (GC Exh. 4.) The policy contained in the MI states

> Management at each Postal Service employment installation may permit employees to make limited personal use of Postal Service office equipment, including information technology, provided such use does not:
>
> - Reduce or otherwise adversely affect the employee's productivity during work hours.
> - Interfere with the mission or operations of the Postal Service.
> - Violate the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR 2635).

(GC Exh. 4.) The MI goes on to list examples of limited personal use, including, "sending a brief e-mail message." (GC Exh. 4.) According to the MI, limited personal use must not, "reduce employee productivity or interfere with official Postal Service business (e.g., congest, delay, or disrupt any Postal Service system or equipment)." (GC Exh. 4.)

On January 25, Henegar sent an email to the MTSC distribution list, reminding employees that they stay productively engaged while at work. (R. Exh. 4; Tr. 211.) Henegar stated

> Your conduct on-duty is subject to evaluation and the Standards of Postal Conduct. Have addressed this, Mr. Fauchier has addressed this and I believe it is well-known via other communication. While you are on-the clock, in a work status, you are to stay productively engaged in your work . . .
>
> Emailing all employees in the network with non-work related items, during work hours, is an inefficient use of resources. This platform was created to provide you and your peers the opportunity to share each other's knowledge and skills to better perform your job. Please ensure that, while you are on working time, your

[14] Respondent conceded that Young was engaged in protected, concerted activity in the course of the emails of March 14. (R. Br., p. 2.)

> efforts stay affixed to that goal. This is an expectation, and failure to adhere to this expectation can lead to corrective action.
>
> I do not relish issuing statements like this. Please evaluate your own performance and ensure that you are working in the manner expected. If you are not sure, please discuss with us individually or with your union representative, as appropriate.

(GC Exh. 5; R. Exh. 4.) In response to Henegar's email, Young copied the MTSC distribution list, stating

> If [you] would check service now you would see all NSTN logged in and ready or actively working logs. Use of email is within management instructions EL-660-2009-10.
>
> Your threats and harassment are an abuse of supervisory authority and are creating a hostile work environment.
>
> You have the right to ignore conversations between NTSN if you choose.

(GC Exh. 5; R. Exh. 4.)

On March 24, NST Robert Levy sent an email to Henegar regarding emails sent by Young. (R. Exh. 6.) Levy stated that over the past few months "we" have received serious Spam from Young resulting in the issuance of "blanket policies." Levy stated, "This will not be best for the future of our Team, and the Company." Levy goes on to state that the communication highway needs to stay open, but not with Spam like this. In addition, Levy stated that he gets loaded down with emails that make him uncomfortable, changing his mood and becoming a safety issue. Levy goes on to state, "This is BS!"

Other NSTs have sent nonwork related emails to the MTSC distribution list. On September 24, 2016, NST Louis Mazurek sent an article from the satirical publication *The Onion* to the MTSC distribution list and NST Bill Larsen responded to Mazurek and the entire MTSC distribution list. (GC Exh. 17.) The subject line of Larsen's email was "Experts Advise Against Throwing Laptop Across Office Even Though It Will Feel Incredible." (GC Exh. 17.)

On March 15, NST Tretick sent an email to over 50 NSTs which included an NBC News report that Respondent would offer early retirement to 150,000 workers. (GC Exh. 28.) Two of the NSTs replied to the entire group. (GC Exh. 28.) The final response was copied to the MTSC distribution list. (GC Exh. 28.)

On August 21 and 23, NSTs shared emails with the entire MTSC distribution list regarding a solar eclipse. (GC Exh. 29.) In late August and early September NSTs shared numerous emails about flooding in Houston, Texas, with the entire MTSC distribution list. (GC Exh. 18.) These emails included jokes and photos of weather reports, a photo from the movie "Jaws," and a photo of a ship being overtaken by a Kraken. (GC Exh. 18.) Henegar considered these emails inappropriate, and further testified that they were discussed internally. (Tr. 223.) Watts did not

consider these emails inappropriate because he was concerned for three NSTs domiciled in Houston at the time of a hurricane. (GC Exh. 18; Tr. 342–343.)

On September 11, Tretick sent a humorous email regarding the impact of Hurricane Irma to the MTSC distribution list. (GC Exh. 19.) Henegar was not sure whether Tretick was working when he sent this email. (Tr. 224.) Watts did not consider Tretick's email inappropriate because he was concerned for the welfare of six NSTs domiciled in Florida, including Tretick, at the time of Hurricane Irma. (Tr. 344.)

Also on September 11, NST James Lynch sent a humorous email regarding a whiskey-fueled car to the MTSC distribution list. (GC Exh. 20.) Lynch's email garnered numerous responses, also sent to the entire MTSC distribution list, including jokes regarding beer and the use of chainsaws. (GC Exh. 20.) Watts was also aware of this email exchange, but was not concerned about it, as it showed an NST about to cut up a tree that fell in his yard during Hurricane Irma. (Tr. 345.)

Between September 15 and 17, NSTs shared emails regarding a group of employees styled "the Irma Road Crew." (GC Exh. 22.) This email exchange contained photos and discussion of steaks and beer served for dinner to the Road Crew. (GC Exh. 22.) Henegar testified that these emails were not the same tenor as Young's emails; they were not the equivalent of screaming on the work room floor. (Tr. 256.) Watts was not concerned about this email either. (Tr. 346.) Watts contrasted Stein's email with that of Young, which he said contained "derisive conversation." (Tr. 346.)

Henegar admitted to sending nonwork-related emails through Respondent's email system, albeit infrequently. (Tr. 237.) Henegar further admitted that MTSC employees send lots of emails on nonwork subjects and he considers it a common problem. (Tr. 237–238.) He testified that employees should never send emails to the entire MTSC distribution list about nonwork issues because some employees might be working at the time they receive the email. (Tr. 240.) Watts testified that employees occasionally use Respondent's email to discuss things that have nothing to do with work. (Tr. 365.)

L. Issuance of Notice of Suspension to Young

On March 14, Henegar issued Young a "Notice of Fourteen (14) Day Suspension" (notice of suspension). (GC Exh. 14; Tr. 119–120.) The basis for the notice of suspension was unsatisfactory conduct for incidents occurring on February 8 and 10. (Tr. 120.)

Specifically, the notice of suspension states

> Charge: Unsatisfactory Conduct—Failure to Follow Instructions
>
> On February 8, 217, I sent you an inquiry regarding your activity in a HelpDesk log for South Jersey PDC. Your response to my question was dismissive and failed to answer the question I posed. You were directed by me that the email was a private inquiry in nature and that you have been advised that emailing the entire network with such matters was inefficient and inappropriate. . . .

> Despite this instruction, you emailed the entire network (MTSC-DL-National Support Technicians) as well as several union officials, despite previous instruction to cease this behavior during productive working hours . . . This behavior is disruptive to the network, and causes other technicians to deviate from their work while reviewing email traffic that is not germane to their task, productive or in regard to the overall knowledge base.
>
> On February 10, 2017, MFSS Brian Watts sent a similar inquiry to you regarding a HelpDesk log for Lincoln PDF. Mr. Watts had a concern regarding the escalation process and inquired of you regarding your handling of the ticket. Again, you were curt in your response, and copied the entire network and several union officials. Even after being instructed by Mr. Watts that you should not respond to the entire network, you did so.
>
> . . . However, you have provided no explanation regarding your repeated failure to follow direct orders that would mitigate or validate your actions.
>
> As such, I find no excuse that would support authorization or mitigation for your failure to follow instructions.
>
> . . .
>
> Your actions are in violation of the following Employee and Labor Relations Manual (ELM) Sections:
>
> 665.13 Discharge of Duties . . .
>
> 665.15 Obedience to Orders . . .
>
> 665.16 Behavior and Personal Habits . . .
>
> 665.6 Disciplinary Action . . .

(GC Exh. 14.)

Young's discipline was based on Employee Labor Relations Manual (ELM) sections 665.13 (Discharge of Duties), 665.15 (Obedience to Orders), and 665.16 (Behavior and Personal Habits). (GC Exh. 14; Tr. 263, 269.) The notice of suspension was specific to the instructions Henegar gave Young. (Tr. 64.) Henegar did not cite to any rules specifically mentioning use of email in the notice of suspension. (Tr. 264.) Henegar testified that the MI concerning limited use of government systems, including email, did not factor into his decision to issue the notice of suspension. (GC Exh. 4; Tr. 264.)

Henegar requested a 14-day suspension for Young because he failed to follow Henegar's instruction to stop copying the network on emails that were not pertinent to the network. (Tr. 213.) Henegar was concerned that these emails were not an efficient use of his subordinates'

time. (Tr. 225.) Henegar believed that Young took away from other employees doing their work because they had to read his emails. (Tr. 258.) Henegar did not know which employees read Young's emails. (Tr. 259.) Henegar believed that Young failed to follow instructions and work conscientiously and effectively by emailing the entire network with issues not pertinent to them. (Tr. 246–247.) Henegar testified that Young's copying of the union officials was not a factor in his decision to issue the discipline.[15] (Tr. 216.)

A Pre-Disciplinary Investigative Interview (PDI) was held on February 17, 2017, with Henegar, Young, and Young's union steward, David Rubino. (GC Exh. 16; Tr. 214.) During the PDI, Young was asked to explain his continued copying of the entire network despite instructions to stop doing so. (GC Exh. 16.) Young's responded by referring the interviewer to his email exchanges with Henegar and Watts. (Id.)

Before issuing the notice of suspension, Henegar conferred with a higher level manager. (GC Exh. 26; Tr. 265–266, 268.) Henegar believed Young's response to him was flippant and failed to answer the question posed.[16] (Tr. 266.)

Previously, Young received a letter of warning in May 2016 for working unauthorized overtime. (GC Exhs. 14, 15; Tr. 129.) Young had also previously received a 7-day suspension for unsatisfactory conduct on February 21. (GC Exh. 15; Tr. 121.) This suspension was for the leave taken by Young on December 30 for which he was deemed AWOL. (GC Exh. 15; Tr. 122.) The Union filed a grievance for Young over the discipline, despite Young's request that the Union take no action. (GC Exh. 25; Tr. 122.) As part of the resolution of a national grievance, Respondent was to remove the AWOL designation, make Young whole for any leave he requested, and rescind the discipline.[17] (Tr. 122.)

Young filed a grievance over the notice of suspension. (GC Exh. 8, p. 2.) The grievance has not been resolved, but remains in the parties' grievance-arbitration procedure. (Tr. 217.) Young has not yet served the suspension. Without resolving the grievance, Watts reduced Young's 14-day suspension to a 7-day suspension on May 17. (R. Exh. 9; Tr. 339–340.) Watts advised the Union that the suspension was downgraded because Young's previous 7-day suspension was not properly scheduled for a meeting in accordance with the parties' contract. (R. Exh. 9, p.2.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Corp.,*

[15] Henegar's testimony stands in contrast to the notice of suspension, which stated that Young was disciplined for, "Email[ing] the entire network (MTSC-DL-National Support Technicians) as well as several union officials." (GC Exh. 14.)

[16] However, Henegar testified that Young's email of February 10 answered his concerns. (Tr. 203, 255.)

[17] The settlement regarding the leave policy for the MTSC is in the record as GC Exh. 24.

335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Corp.,* 335 NLRB at 622.

Some of my credibility findings are incorporated into the findings of fact above. However, I found Young to be a generally credible witness. He testified in a forthright and candid manner. His testimony did not waver on cross-examination. Most of his testimony was supported by the documentary evidence received at the trial. However, I did not credit his testimony on one point. Young testified that he did not discuss the issues in his emails of February 8 and 10 with anyone via email. (Tr. 156.) He then stated that he discussed these issues with other employees in person and on the telephone. (Tr. 156–157.) Young's pretrial affidavit stated that he "Did not discuss these issues with any of my fellow employees" without any reference to the mode of communication. (Tr. 156–157.) As such, I do not credit Young's testimony that he discussed these issues with other employees via telephone or in person. I instead credit his affidavit testimony, which was given closer in time to when these incidents occurred. Otherwise, I found Young's testimony consistent and credible.

Erich Henegar testified in a measured and straightforward manner. However, I do not credit his testimony where it is contradicted that of Young or other evidence. Henegar's testimony contradicted that of Fauchier. In Fauchier's opinion, Young was "scheduled leave" because if an individual requests leave after Wednesday of a particular week, it is not considered scheduled leave. However, Henegar testified that Young's request was denied because Respondent was not granting leave in December.

Henegar further wrote on two occasions that Young failed to answer the question posed in the email exchange of February 8 and 9. (GC Exhs. 14, 27.) However, in the email exchange with Young, Henegar stated that "[Y]our explanation was satisfactory." (GC Exh. 21.) He further testified that Young's explanation was satisfactory at the hearing. (Tr. 254–255, 266.) Given these contradictions, I credit Henegar's testimony where it is inherently plausible or uncontradicted, does not contradict the testimony of Young, or does not contradict the documentary evidence in this case.

Brian Watts was a difficult witness. He was confrontational and failed to directly answer direct questions posed by the General Counsel. For example, Watts refused to directly answer a question under cross-examination and was admonished

> Q. What machine is this, sir?
> A. It's an AFSM 100, it sorts flat mail. . .
> Q. Have you worked on one yourself?
> A. Absolutely.
> Q. Now in this case, was Mr. Young's diagnosis of this equipment right?
> A. In that cable, the cable replacement didn't fix it and it crashed again, I guess you could infer that.
> Q. No, is that wright or wrong . . .
> A. I would have to say that - -
> Q. You can answer that with a yes or no. . .

A. Sir, just excuse me, I'll give my testimony, okay?
JUDGE OLIVERO: Wait, sir, you['ve] got to answer the question that he asks you . . . so if he asks you a yes or no question, you've got to answer it, your counsel has a chance to follow up when he's done.

(Tr. 353–354.)

Watts further could not state how often NSTs refer tickets to SMEs. He engaged in the following exchange with the General Counsel

Q. Is that a common occurrence at the MTSC?
A. Not a, no, it's not prevalent, no.
Q. How often does it happen?
A. I can't speak to that, I wouldn't know the numbers.
Q. You wouldn't know the numbers?
A. I wouldn't.
Q. How many times did it happen last week?
A. I can't speak to that with precision.
Q. You don't know.
A. Pardon me?
Q. Is it part of your job to monitor things like this?
A. It's a part of my job to make sure the field is supported, yes.
Q. My question to you, if you could answer it directly, is it part of your job to monitor incidents like this where it would, in your words, flip [to an SME]?
A. It is, yes, when it comes across and comes to my attention, I do monitor and do take the appropriate action.
Q. So that is part of your job, yes?
A. Yes.

(Tr. 355–356.) Moreover, this testimony was contradicted by Henegar, who testified that about 1/3 of calls to the NSTs are referred to SMEs.

Watts' attempts to explain why he considered clearly nonwork related emails to be work related or of interest to all NSTs were unavailing. Emails containing jokes, a photo from the movie *Jaws*, a photo of a ship being overtaken by a Kraken, and photos of steaks and beer are not work-related. Watts' efforts to explain that these emails were an acceptable use of Respondent's email system and work time by stating he was concerned for employees in areas affected by hurricanes bordered on the absurd. His description of Young's emails as divisive and derisive was nothing more than a veiled reference to Young's protected, concerted activity. Given Watts' difficult demeanor and the contradictory and implausibility of his testimony, I do not credit it except where it is uncontradicted or is supported by other testimony or evidence.

I found Daniel Fauchier to be a credible witness. He testified in a direct and sincere manner. His testimony was limited to the work hours of NSTs, Young's leave request in late December 2016, and the REAL ID email exchange detailed above. Fauchier candidly admitted that he advised the NSTs to cease the REAL ID email exchange and limit any further responses to him. However, I do not credit his testimony that Young requested emergency leave in late December

2016 as his testimony is contradicted by Young's leave form, which requests, "Annual Leave." (GC Exh. 31.) As such, I credit his testimony, except where it is contradicted by documentary evidence.

B. The Deferral Issue

As an affirmative defense and in its brief, Respondent argues that this case should be deferred to the parties' grievance-arbitration procedure.[18] (GC Exh. 1(f); R. Br. p. 29.) Whether the Board should defer to the parties' grievance-arbitration procedure is a threshold issue that must be addressed before considering the merits of the complaint allegations.[19] The relevant standard is set forth in *Collyer Insulated Wire,* 192 NLRB 837 (1971). In *Collyer,* the Board explained the competing interests in such cases: [E]ach such case compels an accommodation between . . . the statutory policy favoring the fullest use of collective bargaining and the arbitral process and . . . the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." 192 NLRB at 841.

The Board has determined that it will not defer 8(a)(3) or (1) allegations to the arbitral process "unless the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case." *Babcock & Wilcox Construction Co*., 361 NLRB 1127, 1138–1139 (2014).

If that initial question is satisfied, the Board considers six factors in deciding whether to defer a dispute to arbitration: (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; whether the agreement provides for arbitration in a very broad range of disputes; (3) whether the arbitration clause clearly encompasses the dispute at issue; (4) whether the employer asserts its willingness to resort to arbitration for the dispute; and (5) whether the dispute is eminently well-suited to resolution by arbitration. *Mercy Hospital,* 366 NLRB No. 165 (2018), citing *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 17 (citing *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011)).

There is no evidence in the record that the parties have explicitly authorized the arbitrator to decide the unfair labor practice issues. Respondent cites to no section of its collective-bargaining agreement with the Union that explicitly authorizes an arbitrator to decide Section 8(a)(3) or (1) allegations. The collective-bargaining agreement does not even prohibit discrimination against an employee for engaging in union or other protected, concerted activity. (GC Exh. 2, p. 4.) The collective-bargaining agreement does not reference employees' use of Respondent's email system. Instead, the collective-bargaining agreement contains general language that defines a grievance as a dispute related to wages, hours, and conditions of employment and which may include the interpretation, application of, or compliance with the collective-bargaining agreement or any local memorandum of understanding. (GC Exh. 2, pp.

[18] The 14-day suspension of Young was the subject of a grievance filed by the Union. The grievance was resolved "unilaterally" by Watts, who reduced the suspension to a 7-day suspension. There is no evidence that this matter was ever scheduled for arbitration or that the Union and Respondent even discussed arbitration of Young's grievance. As such, I consider this matter under the Board's prearbitral deferral standard.

[19] See Sec. 102.35(a)(9) of the Board's Rules.

76–77.) Furthermore, the collective-bargaining agreement permits arbitration "in the event the parties have failed to reach agreement within 60 days of the dispute in Step 4." (GC Exh. 2, p. 87.) I cannot find that these general statements satisfy the Board's standard that the parties have explicitly authorized the arbitrator to decide whether Respondent violated Section 8(a)(3) or (1) of the Act. Therefore, I find that this case is inappropriate for deferral.[20]

C. Discussion of Concertedness and Mutual Aid and Protection

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market,* 361 NLRB 151, 153 (2014). Although these elements are closely related, they are analytically distinct. Id.

A respondent violates the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action motivated by employee's protected, concerted activity.[21] *Lou's Transport,* 361 NLRB 1446, 1447 (2014). Although Section 7 does not specifically define concerted activity, the legislative history of Section 7 reveals that Congress considered the concept in terms of "individuals united in terms of a common goal." *Meyers Industries,* 268 NLRB 493 (1983) (*Meyers I*), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), cert denied 487 U.S. 1205 (1988). The Board broadened the scope of the definition of concerted activity in *Meyers II* to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887.

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations,* 344 NLRB 191, 196 (2005); and see, e.g., *Ewing v. NLRB,* 861 F.2d 353 (2d Cir. 1988). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

The Board has long found that activity is concerted where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group. *Alchris Corp.,* 301 NLRB 182, 182 fn. 4 (1991). In certain circumstances, the Board has acknowledged that "ostensibly individual activity may in fact be

[20] Respondent argues that deferral is appropriate because, inter alia, without resolving the grievance, Young's 14-day suspension was unilaterally reduced to a 7-day suspension by Watts. (R Br. p. 31.) It is true that Watts determined that the grievance matter should be dismissed by reducing the level of discipline. Nevertheless, there is no clear evidence to explain why the Union did not pursue Young's grievance further. It has been found that the Board did not abuse its discretion in declining to defer a case to the parties' grievance-arbitration procedure in such circumstances. *King Soopers v. NLRB,* 859 F. 3d. 23, 33 (D.C. Cir. 2017). Instead, the Court found that, as there was no settlement agreement between the parties here, there was no arbitration decision, and, importantly, the grievance was not resolved on the merits pursuant to an agreed-upon disposition process outlined in the contract, deferral would have been inappropriate. Id.

[21] It is axiomatic that not all concerted activity is protected, including that which is unlawful, violent, or in breach of contract. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action or seeking changes affecting the group. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984).

More recent Board cases have further clarified the proper analysis for determining whether activity is concerted. Whether an employee's activity is concerted depends on the manner in which the employee's actions may be linked to those of his or her coworkers. *Fresh & Easy Neighborhood Market,* supra at 153. The Supreme Court has observed that there is no indication that Congress intended to limit Section 7 protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Id. citing *NLRB v. City Disposal Systems,* 465 U.S. 822, 835 (1984).

Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, supra, at 154. An employee's subjective motivation for taking action is not relevant to whether that action was concerted. Id. Indeed, as noted by the Board, employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. Id. citing *Circle K Corp.,* 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Solicited employees do not have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. Id. at 6, citing *Mushroom Transportation,* 330 F.2d 683, 685 (3d Cir. 1964), *Circle K Corp.,* 305 NLRB at 933; *Whittaker Corp.,* 289 NLRB 933, 934 (1988); and *El Gran Combo,* 284 NLRB 1115, 1117 (1987). Further, the concerted nature of an employee's complaint is not dependent on the merit of the complaint. Id. citing *Spinoza, Inc.,* 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973).

The concept of "mutual aid or protection" focuses on the goal of the concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. Id. citing *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, supra at 156. The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Id. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of his or her fellow employees. *Dignity Health,* 360 NLRB 1130, 1132 (2014).

D. Young's Actions in Replying to Emails

Respondent conceded that Young and/or other employees were engaged in protected, concerted activity relative to the emails of January 9 and 10, March 13, and March 14. (R. Br. p. 2.) However, Respondent contests that Young was engaged in protected, concerted activity with regard to the email exchanges of February 8 and 10.

I find that Young's actions in responding to an individual email with a response to the other employees in his group amounted to protected, concerted activity. NSTs are scattered

throughout the United States and communicate mostly through email. Young testified that he forwarded the emails to the entire group because he was hoping other NSTs would support him, he felt he was being harassed, and he feared discipline.[22]

Viewed objectively, Young's actions constitute protected, concerted activity. When Young responded to Henegar on February 8, copying the MTSC distribution list, he stated

> In light of the harassment intimidated [sic] and threats receive [sic] from MTSC I fell [sic] it is only prudent to have our conversations in a public forum. You are making for a very hostile work environment with these threats if this was a technical question as you stated it could only benefit the whole network as to proper procedures[.]

(GC Exh. 21; R. Exh. 2.) Young was clearly trying to alert coworkers that he was receiving what he perceived as harassment by Henegar and, if Henegar was merely questioning Young's adherence to procedures, to advise the entire network how to adhere to the procedures. In response, Henegar advised Young, "Again, my individual questions to you do not need to be broadcast to the entire network." (GC Exh. 21, p. 1.)

When Young responded to Watts on February 10, copying the MTSC distribution list, his response stated that "Am I the only one being harassed by these emails you and Mr. Henegar keep sending me?" (GC Exh 11, p. 2.) Again, Young was clearly trying to alert coworkers to perceived harassment and asking whether any other employees were being harassed. In response, Watts stated, "[A]s you have been previously instructed on several occasions, when corresponding with management it's not necessary to copy the entire network." (GC Exh. 11, p. 1.)

Initially, the Board has found conduct to be concerted without any actual or planned future group action if it is "the type of preliminary groundwork necessary to initiate group activity." See *Salon/Spa at Boro*, 356 NLRB 444,453–454 fn. 31 (complaints that "did not produce . . . group protest to management" but "did produce some group activity [by causing] other employees to voice support for [the] complaints"). "The activity of a single employee in enlisting the support of his fellow employees for their mutual aid or protections is as much concerted activity as is ordinary group activity." *Whittaker Corp,* 289 NLRB 933 (1988). In Young's emails of February 8 and 10, he states that he is trying to "benefit the whole network" and asks if others are being harassed. Later, another NST joined in Young's frustrations and told Young that Henegar's treatment amounted to harassment. Thus, I find that Young's emails copied to the MTSC distribution list on February 8 and 10 constituted protected, concerted activity undertaken for purposes of mutual aid and protection.

As I have found, Young is the only MTSC employee at the main St. Louis Post Office. The only ways for him to communicate with his peers is via email or telephone. Thus, the only way for Young to find out if other employees are being harassed, or if Respondent had changed its policies and procedures related to NSTs' work performance, was via telephone or email. If

[22] Young was ultimately disciplined for his failure to follow Henegar's and Watts' instructions not to copy the MTSC distribution list in his emails.

Young were to have called each of the other 100 or so NSTs to inquire about harassment by management or changes in policies and procedures, this would have taken exponentially longer than simply forwarding an email to the MTSC distribution list.

Additionally, in agreement with the General Counsel, I find that Young engaged in a protracted course of protected, concerted activity via email. In responding to an email from Henegar regarding use of Respondent's email system for nonwork purposes, Young copied the MTSC distribution list and stated that such use was within Respondent's email policies contained in MI EL-660-2009-19. In discussing Fauchier's choice of employees for a training opportunity, Young forwarded an email he sent to Fauchier to the MTSC distribution list. Several NSTs responded to Young's email, copying the MTSC distribution network. NST Rick Clary expressed support for Young, noting that Young was, "defending the current contract" and his view was "shared by many." Furthermore, Respondent concedes that Young's actions in copying the MTSC distribution list on January 9, 10, March 13 and 14 were protected, concerted activity. Thus, Young frequently used Respondent's email system for purposes of engaging in protected, concerted activity.

Young was further engaged in union activity when forwarding emails to union officials in addition to the MTSC distribution list. Young forwarded his February 8 and 10 emails to several union officials. Young was informing his union representatives of perceived harassment and possible changes in employer policies and procedures. Young ultimately filed a grievance over his discipline resulting from his failure to follow the instructions of Henegar and Watts not to copy the MTSC distribution list in his emails. (GC Exh. 8.) Thus, I further find that Young's copying of various union officials in his emails of February 8 and 10 constituted union activity.

As was recognized by the Board in *Purple Communications, Inc.*:

> The necessity of communication among employees as a foundation for the exercise of their Section 7 rights can hardly be overstated. Section 1 of the Act unequivocally states:
>
> > It is declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> National Labor Relations Act, 29 U.S.C. § 151. Section 7 of the Act thus grants employees the "right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Such collective action cannot come about without communication. As the Supreme Court stated in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972):
>
> > [Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the

> history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.
>
> Id. at 542–543, quoted in *Beth Israel Hospital v. NLRB*, 437 U.S. at 491 fn. 9. Thus, employees' exercise of their Section 7 rights "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel*, 437 U.S. at 491–492. The workplace is "a particularly appropriate place for [employees to exercise their Section 7 rights], because it is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Eastex, Inc. v. NLRB*, 437 U.S. at 574 (internal quotations omitted).

361 NLRB 1050, 1054 (2014).

The Board has further recognized that, "There is little dispute that email has become a critical means of communication, about both work-related and other issues, in a wide range of employment settings."[23] 361 NLRB at 1055.

Respondent also claims the email was disruptive to production because some employees complained. Even assuming some employees found the email offensive, it is irrelevant to determining disruption due to protected speech. See *Boulder City Hospital*, 355 NLRB 1247, 1249 (2010); *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001).

However, as correctly stated by Respondent, *Purple Communications* concerned an employees' use of the employer's email system during non-work time. Specifically, the Board stated, "we adopt a presumption that employees who have been given access to the employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions." 361 NLRB at 1054. Thus, *Purple Communications* is distinguishable from this case.

In this case, it is not disputed that Young utilized Respondent's email system to communicate with other employees during work time. Henegar testified that Young's email of February 8 was work-related. There can be no doubt that Young's email of February 10 was also work-related, as Watts was questioning Young's work performance. I have already found that Young's forwarding of his emails to Henegar and Watts to the MTSC distribution list constituted protected, concerted and union activity.

[23] Respondent's brief includes a lengthy argument concerning *Purple Communications, Inc.*, 361 NLRB 1050 (2014). (R. Br. pp. 14–21.) Respondent argues that *Purple Communications* is, "unworkable, both generally and relative to the facts of this case, and should not be applied." Respondent further argues that *Purple Communications* should be overturned. I do not reach these issues.

However, even if Young stopped working to protest his working conditions, his actions are still protected. There is no evidence that Young's drafting and forwarding of his brief email messages interfered with his productivity. The Board has held that on-the-job work stoppages of significantly longer duration remained protected. *LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia*, 357 NLRB 1097, 1102 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8 and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with the hotel's operations).

Additionally, Respondent maintains a policy that specifically allows for personal use of its email system. (GC Exh. 4.) This policy allows for the brief sending of an email message and does not interfere with employee productivity. There has been no showing that Young's forwarding of his emails to the MTSC distribution list diminished his productivity or that of his peers. There is ample evidence that Respondent tolerated personal use of its email for the sending of jokes, photos, and nonwork related other matters.

Respondent attempted to differentiate Young's emails from those of his coworkers. I do not accept this differentiation. Watts did not consider emails containing jokes, weather reports, a photo from the movie *Jaws*, and a photo of a ship being overtaken by a Kraken inappropriate. (GC Exh. 18.) Watts' testimony that these emails were acceptable because he was concerned for the well-being of employees in the Houston area defies credulity.

Watts' and Henegar's attempts to distinguish other e-mails from those of young were similarly unavailing. Watts testified that he approved of an email exchange containing jokes about beer and chainsaws because it contained a photograph of an employee about to cut up a downed tree. (GC Exh. 20; Tr. 345.) He and Henegar were not concerned about an email from the "Irma Road Crew" containing photographs of steaks and beer. (GC Exh. 22). Watts testified that these other emails were not of the same tenor as Young's emails; they were not the equivalent of screaming on the work room floor. (Tr. 256.) Watts testified that Young's emails contained "derisive conversation." (Tr. 346.)

Henegar's and Watts' attempts to distinguish the emails sent by Young to the MTSC distribution list from the jokes and other nonwork related items shared by NSTs with the MTSC distribution list fall flat. The only difference between the purportedly humorous emails and Young's emails is that Young's emails constituted protected, concerted and union activity and the other emails did not. I find that Respondent's characterizing of Young's emails as "derisive," "divisive," and "the equivalent of screaming on the work room floor," were merely veiled references to Young's protected, concerted and union activity.

Clearly, performance expectations of employees are terms and conditions of employment. In his email message of February 8, Henegar questioned Young's approach to a work assignment in requesting onsite assistance after a short period of time. In his email message of February 10, Watts questioned Young's approach to a work assignment in elevating a call to a SME after a short period of time. Young copied his responses to both managers to the MTSC distribution list in order to seek assistance and advice from other NSTs. By prohibiting Young from seeking the advice and support of co-workers, Respondent violated Section 8(a)(1) of the Act.

E. Respondent Violated the Act in Directing Young Limit his Replies to Emails to Managers (Complaint Paragraph 5(A) and (B))

As stated above, Respondent concedes that Young was engaged in protected, concerted activity when he sent emails regarding his leave issue on January 9 and 10. (R. Brf. p. 2.) Thus, I find that Young's emails of January 9 and 10 constituted protected, concerted activity. On January 9, Henegar advised Young, "Any response to this email should be restricted to Dan and me." (GC Exh. 10.) On January 10, Henegar advised Young

> First, I have asked you to restrict your email to Dan and me. Specifically, you are afforded grievance rights under Article 15 of the National Agreement should you disagree with the directive. You are not empowered with the right to the equivalent of screaming on the work room floor. Please ensure that you are using the appropriate channels.

(GC Exh. 10.)

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." It is axiomatic that Section 7 protects employees' right to discuss, debate, and communicate with each other regarding workplace terms and conditions of employment.

As a general proposition, an employer violates Section 8(a)(1) when it forbids employees to discuss working conditions or union matters with other employees, when it does not prohibit the discussion of nonwork-related matters while on duty. *Amalgamated Transit Local 649,* 363 NLRB No. 156 (2015). There is no evidence that Respondent prohibited the discussion of nonwork-related matters. In fact, Watts and Henegar found other employees' transmission of jokes and humorous photographs to be acceptable uses of Respondent's email system. Henegar's and Watts' statements to Young not to communicate with other employees about perceived harassment and employee performance standards, violate the Act.

It is well recognized that an employer violates Section 8(a)(1) of the Act by threatening an employee with reprisals for discussing working conditions with other employees and by telling employees to talk to employer representatives about working conditions rather than other employees. Employer restrictions on employee communications with each other have been held to be a violation of Section 8(a)(1) of the Act, even though such communications might take place on company premises. *Hilton's Environmental, Inc.,* 320 NLRB 437, 437 fn. 2 (1995) citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Board has found a violation of Section 8(a)(1) where an employer has prohibited employees from discussing terms and conditions of employment (schedules) with fellow employees. *K Mart Corp.,* 297 NLRB 80 fn. 2 (1989).

Vacation and leave time constitute terms and conditions of employment. *Mesker Door, Inc.,* 357 NLRB 591, 606 (2011). Restricting the discussion of these terms of employment interferes with the exercise of Section 7 rights just as much as a rule forbidding employees from talking about wages. Id.

Young's emails of January 9 and 10, shared with the MTSC distribution list, concerned a perceived changed in the application of Respondent's leave policies. This would be a matter of general concern to Respondent's employees. Specifically, Young had been asked to provide documentation for a leave request, in apparent contravention of Respondent's leave policies. This issue was the subject of a national grievance. The settlement of that grievance required Respondent to remove Young's AWOL designation, make him whole for any leave he requested, and rescind his discipline. Respondent's prohibition on Young sharing information with other NSTs regarding Respondent's application of its leave policies violated Section 8(a)(1) of the Act.

F. Respondent Violated the Act by Instructing Employees to Stop Email Discussions concerning Passports and REAL ID (Complaint Paragraph 5C)

In early March, Respondent's employee undertook a robust discussion of whether Respondent should pay for REAL ID complaint identification for NSTs traveling on official business. This discussion took place using Respondent's email system. Respondent concedes, and I find, that its employees were engaged in protected, concerted activity with when exchanging emails regarding the REAL ID issue. On March 13, Fauchier sent an email to the MTSC distribution list regarding the REAL ID issue. Fauchier advised employees, "The cost of required ID for travel is on the traveler due to the fact that the same ID can be used for personal use as well. END OF SUBJECT please! If you have additional concerns/comments on this subject, direct them to me ONLY." (Emphasis in original) (Id.)

Respondent again advised employees to stop discussing their terms and conditions of employment. In determining whether a statement unlawfully interferes with the exercise of Section 7 rights, the Board does not consider the intent of the speaker. Rather, the Board applies an objective standard of whether the remark tends to interfere with the free exercise of employee rights. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), citing *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). I find that advising employees to stop discussing their terms and conditions of employment would tend to interfere with the free exercise of their Section 7 rights. As such, I find that Fauchier's statement that his email was the "END OF SUBJECT" and that responses should be directed to him alone violated Section 8(a)(1) of the Act.

G. Respondent Violated the Act by Instructing Young to Stop Disseminating Work Instructions and Performance Expectations (Complaint Allegation Added at Trial)

On March 14, Shawn Collins, acting duty officer, sent a work assignment to Young at 12:03 p.m.; Young did not see it until 12:49 p.m. In an email, Young asked Collins to call him in the future, instead of sending an email, when seeking assistance. On March 15, Henegar advised Young to monitor his email, phone, and VOIP for incoming service logs. In his email, Henegar stated

> I am responding to you by email and you may respond to me directly or call me, if you prefer. This is a reiteration of my work instructions performance expectations and is not appropriate for dissemination to the network or anyone else beside you and me. Please ensure that you are working logs and helping our customers, regardless of the format in which they are transmitted. This message

> is not intended to abridge any rights you have under the NLRA and your Article 15 rights afford you the opportunity to consult with the appropriate steward if you have any wish to file a grievance over the matter.

(GC Exh. 13.) Henegar marked this email as "Private" because he considers work instructions to a single employee private.

Young responded to Henegar, copying the MTSC distribution list and certain union officials. Young said he did so to inform other NSTs of what he deemed a "change in policy." Young advised Henegar to review the Standard Operating Procedure (SOP) for NSTs, which requires NSTs to check their email only twice a day while on duty.

Respondent concedes, and I find, that Young was engaged in protected, concerted activity when he copied an email response to Henegar to the MTSC distribution list on March 14. Work instructions and performance expectations are terms and conditions of employment. I find that Respondent's instruction that Young stop discussing his terms and conditions of employment with coworkers violated Section 8(a)(1) of the Act.

H. Roy Young's Suspension Violated the Act (Complaint Par. 6)

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by issuing Young at notice of 14-day suspension. (GC Exh. 1(c).) In its answer, Respondent denied that it violated the Act. (GC Exh. 1(f).) In its brief, Respondent did not analyze the lawfulness of the issuance of the notice of suspension, instead arguing that this issue should be deferred to the parties' grievance-arbitration process. (R. Br. p. 29.) I have already decided, as an initial matter, that deferral is inappropriate in this instance.

The motivation for the issuance of Young's notice of suspension is not in dispute. Young received the notice of suspension for failing to follow the instructions of Henegar and Watts not to copy the MTSC distribution list on his email responses on February 8 and 10. I have already found that Young was engaged in protected, concerted and union activity when he did so. As such, Young was disciplined for engaging in protected, concerted activity. Where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line*[24] analysis is not required. *Chromalloy Gas Turbine Corp*., 331 NLRB 858, 864 (2000), enfd. 262 F.3d 184 (2d Cir. 2001). See also *Allied Aviation Fueling of Dallas, LP,* 347 NLRB 248, 254 fn. 2 (2006), enfd. 490 F.3d 374 (5th Cir. 2007)("The Board has consistently held that, where an employer admits that it discharged an employee for engaging in protected activity, a *Wright Line* analysis is inapplicable.") Respondent has advanced no other reason, such as misconduct, for Young's discipline other than his forwarding emails to co-workers about their terms and conditions of employment. The stated reason for Young's discipline was his failure to follow the orders of Henegar and Young not to forward emails to his co-workers. As Young was disciplined for engaging in protected, concerted activity, I find that Respondent violated Section 8(a)(3) and (1) of the Act in issuing him the notice of suspension.

[24] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983).

I further find that Young's actions in forwarding his emails to the MTSC distribution list did not lose the protection of the Act. None of Young's emails contained profanity or false information. Young's emails were also work-related, unlike the emails of coworkers containing jokes and humorous photographs. Henegar and Watts had an excuse for other emails, except when Young used Respondent's email system to engage in protected, concerted and union activity to bring attention to his harassment by management and to possible changes in Respondent's work expectations for NSTs. Respondent did not even cite its Management Instruction concerning the use of its email system as a reason for Young's discipline, instead relying on his failure to follow instructions. Given these circumstances, I find nothing in Young's emails of February 8 or 10 that would have cost him the protection of the Act. As such, I find that Respondent's issuance of the notice of suspension to Young violated Section 8(a)(3) and (1) of the Act.

However, even under the burden shifting framework of *Wright Line,* I would find that Respondent's disciplining of Young violated the Act. In *Wright Line,* the Board determined that the General Counsel carries the initial burden of persuading by a preponderance of the evidence that an employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. The elements required for the General Counsel to meet his initial burden are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel meets that burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line,* 251 NLRB at 1089; *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Once the General Counsel has met the initial burden under *Wright Line,* an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.,* 316 NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996).

The General Counsel has established that Young's protected, concerted and union activity was a motivating factor in his discipline. Respondent's managers advised Young on numerous occasions to stop disseminating emails to the MTSC distribution list and it was his failure to follow these instructions that resulted in his discipline. I have found that Young was engaged in protected, concerted and union activity when he forwarded his emails. Respondent clearly had knowledge of his activity, as the messages were received by both Henegar and Watts. Respondent bore animus to this activity, as it mentioned Young's repeated failure to follow instructions and its admonitions to his to stop forwarding emails to the MTSC distribution list. Respondent has made no effort to prove it would have taken the same action against Young absent his protected conduct. As such, I would find that the General Counsel would have proved a violation of Section 8(a)(3) and (1) under the burden shifting framework of *Wright Line.*

I. Respondent's Other Affirmative Defenses

In its answer to the complaint, Respondent raised several affirmative defenses in addition to the deferral defense, including that the complaint fails to state a claim upon which relief can be granted, the Charging Party's actions were not protected because he engaged in the conduct

during his work time, the Charging Party lost the protection of the Act, and the Charging Party failed to bargain in good faith by failing to use the grievance procedure set forth in the parties' collective-bargaining agreement. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co*., 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Section 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its affirmative defenses other than the deferral defense at the hearing, and the affirmative defenses were not raised in Respondent's brief. As such, I will not address them further.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (PRA).

2. American Postal Workers Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act on multiple occasions when it directed employees to limit their email communications to supervisors and managers only, and not to copy or forward emails to other employees, or their union representatives, when such emails constituted protected, concerted and/or union activity.

4. Respondent violated Section 8(a)(3) and (1) of the Act by issuing a Notice of 14-Day Suspension to Roy Young.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend Respondent be ordered to remove from its files any reference to Young's unlawful notice of suspension and to notify him in writing that this has been done and that the unlawful notice of suspension will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, United States Postal Service, St. Louis, Missouri and Norman, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to limit email communications to supervisors and managers only, and not to copy or forward emails to other employees, or to union representatives, when such emails contain communications about terms and conditions of employment and constitute union and/or protected, concerted activity.

(b) Issuing notices of suspension to or otherwise discriminating against employees because they engage in union or protected, concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the notice of 14-day suspension issued to Roy Young on March 14, 2017.

(b) Remove from its files any reference to the unlawful issuance of notice of suspension of Roy Young and notify him in writing that this has been done and that the notice of suspension will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facilities in St. Louis, Missouri, and Norman, Oklahoma, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically to Respondent's National Support Technicians employed at any of its facilities, such as by email, posting on an intranet or an internet site, and/or other electronic means.[27] Reasonable steps shall be taken by the

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[27] I have ordered electric distribution of the Notices due to the geographic isolation of Respondent's National Support Technicians, all of whom were made aware of Respondent's instructions to limit responses to emails to its supervisors and managers and not to copy other employees on emails.

(d) Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2018

Melissa M. Olivero
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT instruct you to limit your email communications to supervisors and managers only, and not to copy or forward emails to other employees, or to your union representatives, when such emails contain communication with us about terms and conditions of employment and constitute union and/or protected, concerted activity.

WE WILL NOT suspend or otherwise discriminate against you because you engage in union or protected, concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the notice of 14-day suspension issued to Roy Young on March 14, 2017, and WE WILL remove from our files any reference to the notice of 14-day suspension issued to Roy Young and notify him in writing that this has been done, and that the notice of suspension will not be used against him in any way.

UNITED STATES POSTAL SERVICE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-195011 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 449-7493.